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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ALI ASGHAR KIMIA, Defendant and Appellant.	A147709 (Alameda County Super. Ct. No. C165841)

Appellant Ali Asghar Kimia was convicted following a jury trial of premeditated attempted murder, carjacking, second degree robbery, elder abuse, and assault with a deadly weapon. On appeal, appellant contends the trial court erred when it failed to (1) give a unanimity instruction on the attempted murder count, and (2) stay his sentence on the assault with a deadly weapon count pursuant to Penal Code section 654.[1] In supplemental briefing, appellant further argues that newly enacted section 1001.36, which permits the trial court to grant pretrial diversion in certain cases in which a defendant's mental health disorder played a "significant role in the commission of the charged offense" (§ 1001.36, subd. (b)(2)), is retroactive to cases such as his that are not final on appeal. We shall affirm the judgment.

PROCEDURAL BACKGROUND

Appellant was charged by amended information with premeditated attempted murder (§§ 187, subd. (a), 664, subd. (a)—count one); carjacking (§ 215, subd. (a)—count two); second degree robbery (§ 211—count three); elder abuse (§ 368, subd.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

(b)(1)—count four); and assault with a deadly weapon (§ 245, subd. (a)(1)—count five). The information alleged as to all counts that appellant had committed great bodily injury against an elderly victim (§ 12022.7, subd.(c)) and had used a deadly weapon, a ligature, in committing the offenses (§ 12022, subd. (b)(1)). The information further alleged as to counts two and three that appellant had committed a violent crime against a vulnerable person (§ 667.9, subd. (a)) and had inflicted great bodily injury on a vulnerable victim (§ 1203.09, subd. (a)). The information also alleged that appellant had three prior felony convictions and two prior prison terms (§ 667.5, subd. (b)).

On September 4, 2012, the trial court found appellant mentally incompetent to stand trial, pursuant to section 1368. On January 24, 2014, the court found him competent to stand trial.

On September 8, 2014, appellant entered a plea of not guilty by reason of insanity.

On October 14, 2015, a jury found appellant guilty on all counts and found all of the great bodily injury, deadly weapon, and violent crime on a vulnerable victim allegations true. On October 22, 2015, the jury found appellant legally sane at the time he committed the offenses and found true the prior conviction allegations.

On January 22, 2016, the trial court sentenced appellant to 28 years to life in prison.

Also on January 22, 2016, appellant filed a notice of appeal.

FACTUAL BACKGROUND[2]

Joseph Perillo, who was 72 years old in January 2010, testified that on the evening of January 25, he went out to get some food. He drove his car from his home in San Leandro to a parking lot near a pizza restaurant in Hayward, where he planned to get some food. The parking lot was also near an adult book store and a gay bar. Just after he got out of his car, a sudden downpour of rain caused him to return to the car. A man approached his car and asked for a ride. Because it was raining so hard, Perillo told him

[2] These facts include evidence from the guilt phase of trial only. Evidence from the sanity phase is not relevant to either of the issues raised on appeal.

to get in and asked where he was going. The man said he was going to Sunset and Western, which was in the general direction of Perillo's house. Perillo drove out of the parking lot. He asked the man his name, and the man said his name was Antonio and that he was Jewish. Perillo looked at the man and noticed two distinctive tattoos right above his eyebrows. At trial, Perillo identified appellant as the man who was in his car with the tattoos on his forehead.

Appellant asked Perillo whether he had any hard liquor at his house. Perillo said he did not, but offered appellant beer and drove them to his house. Perillo gave appellant beer and a glass and turned on the television. He then asked appellant, " 'What do you do?' " Appellant responded "that he liked to take hearts and put them here and here and he rubbed his stomach." This answer gave Perillo a chill up his back and he thought, "I have got to get this man out of my house . . . , but I'm going to have to be very careful how I do it. Appellant drank three beers. He then took off his shoes and socks before standing next to Perillo and unzipping his pants.

Perillo took appellant by the hand and asked if he wanted to see Perillo's bedroom. As they went upstairs, appellant took off his shirt and Perillo could see he had tattoos across his back. Once they were in the bedroom, Perillo said to sit on the bed. Appellant sat down and Perillo performed fellatio on him for about half a minute, but then thought this was his "chance" to get appellant out of his house. He looked at the clock and said they would have to leave because his roommates were about to get home. Appellant jumped up, pulled on his pants, and went downstairs to put on his shoes.

Perillo was relieved when he got appellant out of the house. It was approximately 1:00 a.m. at that point. They got into Perillo's car, and appellant said he wanted to return to the parking lot. Perillo drove to the parking lot, where appellant got out of the car to retrieve something he had left there, possibly an umbrella. Appellant then got back into the car. Perillo told appellant he would take him to Sunset and Western and to say when to stop the car. When they passed the intersection and appellant did not say anything, Perillo stopped at Grove Street and said, "this is the last stop."

The next thing Perillo knew, appellant was attacking him with a cord of some kind, which he put around Perillo's neck and started pulling tighter and tighter. Perillo tried to get his finger between the cord and his neck while also trying to get his seatbelt off. He managed to unfasten his seatbelt and unlatch his door. He then pushed all of his weight into the door and fell into the street. He did not remember much of anything after that.

Perillo woke up in a hospital. His face was swollen and purple, his eyes were red, and he had marks on his neck. He also had pain in his back, face and throat. It was hard to swallow and his voice was raspy. He never fully recovered his ability to walk long distances.[3]

After the incident with appellant, Perillo's wallet, which had been in his jacket pocket, was missing. The wallet, which he never got back, contained $100 in cash, a credit card, an ATM card, his driver's license, other cards, and a list of personal identification numbers (PINs) for his various cards. He later learned that someone had withdrawn $103 from various ATMs about 14 different times. There were also several credit card purchases Perillo had not made. Perillo's 1989 Honda Accord was also missing for one to two weeks. When it was returned to him, it was full of junk, including the knapsack appellant had been carrying. Inside the knapsack were two shoelaces tied together. He took the laces to the authorities and said he believed appellant might have used the laces to strangle him.

Police showed Perillo a photo lineup, but he did not recognize anyone in the photographs. He did, however, recognize a photograph of the tattoos on appellant's back. He testified that he did not recognize appellant in the first photo lineup because his hair was shorter in the photograph than at the time of the incident.

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[3] The doctor who first treated Perillo at the hospital testified that his face and lips were swollen and mildly discolored. His voice was hoarse and he had an abrasion across the front of his neck. He also had small hemorrhages around the whites of his eyes. A CT scan showed a fracture of both corneas and fractures of the larynx and thyroid cartilage. His injuries were consistent with having been strangled.

Emanuel De Sousa, who lived on Western Boulevard in Hayward, testified that around 2:00 a.m. on January 26, 2010, he was returning from work at Children's Hospital in Oakland when he saw "some old guy" leaning against BART tracks or posts, sitting on the guardrail and looking like he needed help. His face was very red, like he was drunk or had just had a stroke. De Sousa was going to call 911, but he then saw a car pull up slowly. He stepped back, thinking the person was going to help the man. But the person got out of the car, leaving the engine running, and walked quickly up behind the man in a "funny" way. He snuck up on the man "like he was a cat or something." De Sousa initially thought it was funny because he thought the two were friends and horsing around, but then it got serious.

The person jumped on top of the man "and started choking the hell out of him," using "just his hand." De Sousa said, " 'Hey, you better cut it out. You're going to kill the old man.' " The person responded that De Sousa should mind his own business. When De Sousa said he was going to call the police, the person stopped choking the man, walked back to his car, and drove away quickly. The assailant was about six feet tall. De Sousa did not get a good look at the attacker's face; he was focused on the victim. After the attack, the man was even redder than he had been earlier. De Sousa called the police and stayed until an ambulance came and took the man away.

Alameda County Deputy Sherriff David McKaig testified that around 1:42 a.m. on January 26, 2010, he was on duty in Hayward, standing outside his marked patrol vehicle, when he noticed a vehicle slowly passing by in the westbound direction. Approximately 10 minutes later, the same vehicle again passed by going eastbound, about 10 miles an hour. This time, McKaig was able to see the vehicle's sole occupant. Two minutes later, the same vehicle passed by again in the eastbound direction, still driving at 10 miles per hour. An automatic license plate reader on his patrol car took a photograph of the car's license plate. About 20 minutes after the last time the vehicle drove by, McKaig heard a dispatch broadcast about something having happened around Western and Grove. McKaig was subsequently able to identify the driver as appellant and the vehicle as Perillo's.

Alameda County Sheriff's Deputy Michael Godlewski testified that in 2010, he was a detective and was assigned to investigate the attempted murder of Perillo. Deputies had a description of a suspect: a white male in his late 20s or early 30s, approximately six feet tall, with broad shoulders. They also had a description of the victim's car: A 1989 Honda Accord. After interviewing the victim, Godlewski was able to identify appellant, using the description of his tattoos, the name Antonio, and the fact that he lived in Hayward. Appellant's address at that time was one or two blocks away from Western and Grove. While the victim was still in the hospital, Godlewski showed him a five-person photo lineup that included a photograph of appellant, but he whited out the forehead areas—where appellant's tattoos were—on each of the five photographs. The victim was unable to identify appellant in the photo lineup. Godlewski then separately showed him photos of appellant's various tattoos and he spontaneously pointed to a tattoo and identified it as one he saw on appellant.

Appellant was subsequently arrested when he was spotted driving Perillo's car. Godlewski and another deputy interviewed him at the jail. After the deputies read him his *Miranda*[4] rights, appellant initially said he did not want to speak to them, but then said he wanted to talk. Most of the interview was recorded, except for a minute or two in the middle. Appellant was more coherent at some points during the interview than at others. In the recorded part of the interview, which was played for the jury at trial, appellant said that he was at a bus stop when Perillo approached him in a vehicle and offered him a ride. Appellant admitted that he choked Perillo with some string or a bungee cord he found in Perillo's car. He said it disgusted him that Perillo was old and gay, and he first thought about choking him and taking his car when Perillo approached him at the bus stop. He said he may have used money from Perillo's wallet to buy alcohol. Appellant also told the deputies that he had hurt and killed "lots of people." Godlewski initially took this statement seriously, but when appellant did not provide any dates or facts, he became more skeptical.

[4] *Miranda v. Arizona* (1966) 384 U.S. 436.

After appellant's arrest, police recovered a red bungee cord from inside a backpack that was on the backseat of Perillo's vehicle. DNA testing on the bungee cord excluded Perillo as a contributor, but did not exclude appellant as a possible match. No DNA was recovered from a wire found on the ground at Western and Grove. A pair of socks recovered from Perillo's house was also tested and appellant was not excluded as a DNA donor.

DISCUSSION

I. *Trial Court's Failure to Give a Unanimity Instruction*

Appellant contends the court erred when it failed to instruct the jury sua sponte with CALJIC No. 17.01, which would have informed the jurors that they must unanimously agree on the act constituting the offense of premeditated attempted murder.[5]

"When a defendant is charged with a single offense, but there is proof of several acts, any one of which could support a conviction, either the prosecution must select the specific act relied upon to prove the charge, or the jury must be instructed that all the jurors must agree that the defendant committed the same act or acts. [Citation.] When the prosecutor does not make an election, the trial court has a sua sponte duty to instruct the jury on unanimity." (*People v. Mayer* (2003) 108 Cal.App.4th 403, 418 (*Mayer*). "The prosecution can make an election by 'tying each specific count to specific criminal acts elicited from the [witness's] testimony'—typically in opening statement and/or closing argument." (*People v. Brown* (2017) 11 Cal.App.5th 332, 341 (*Brown*).) We review claims that a court should have given a particular instruction de novo. (*People v. Moore* (2018) 19 Cal.App.5th 889, 893.)

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[5] CALJIC No. 17.01 provides: "The defendant is accused of having committed the crime of ___ [in Count __]. The prosecution has introduced evidence for the purpose of showing that there is more than one [act] [or] [omission] upon which a conviction [on Count ___] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he] [she] committed any one or more of the [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count ___], all jurors must agree that [he] [she] committed the same [act] [or] [omission] [or] [acts] [or] [omissions]. It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict." (See also CALCRIM No. 3500 [CALCRIM unanimity instruction].)

Here, appellant is correct that there was evidence of two possible acts of premeditated attempted murder: either the initial strangulation incident in the car or the later strangulation incident near the BART tracks could have supported the attempted murder count. Nonetheless, we agree with respondent that a unanimity instruction was not required in this case because the prosecutor made clear during closing argument that she was relying on the second act of violence, when appellant strangled Perillo near the BART tracks, to prove the attempted murder charge. (See *Brown*, *supra*, 11 Cal.App.5th at p. 341.)

Specifically, the prosecutor referred to the attempted murder count during closing argument, including at the very beginning of her argument when she stated that appellant had "snuck up on [Perillo] to try to kill him. After he had left him strangled in the middle of the street, taken his car, taken his wallet, that wasn't good enough. He went back to finish the job." The prosecutor then spent some time explaining to the jury the prosecution theory of premeditation and deliberation: "Once [appellant] made that decision to go back and finish Mr. Perillo off, to go back and kill him and make sure that he's dead, make sure that his witness is dead, the only one to see this crime—he wanted to make sure he was dead. Once he made that decision, he had premeditated and deliberated. [¶] . . . Every single step that he took show you what he was thinking, that he was intending to kill Mr. Perillo, and that he was deliberating and premeditating."

The prosecutor then described De Sousa's testimony about appellant driving up slowly, leaving the car running but turning off the lights, sneaking up on appellant "like a cat," jumping on the guardrail, and strangling Perillo. The prosecutor asserted that appellant's actions showed that he intended to kill Perillo: "That was his goal, and his actions showed that was his goal, and he premeditated and deliberated beforehand." The prosecutor further asserted that the evidence showed appellant had not acted in the heat of passion when he attempted to murder Perillo: "Even if he were to argue, well, he was angry in the car, something happened in the car that made him upset, and that's why, you know, he went back to kill him, well, he drove . . . up and down Hampton Road for 12 minutes.

The prosecutor discussed the assault with a deadly weapon count, stating that Perillo did not know exactly what "cloth-like" thing went around his neck during the first strangulation in the car. "For the assault with a deadly weapon, for the force used for the carjack and the robbery, the elder abuse, he can't say exactly what was used, but I don't have to prove exactly what was used." The prosecutor further stated, "So again, this is an assault. When he is in the car, and the defendant decides to strangle the victim, that was an assault. And when he used that object, the object that he used that created those ligature marks around the victim's neck, that's a deadly weapon, as we talked about earlier, and so he assaulted Mr. Perillo with a deadly weapon."

In discussing the carjacking count, the prosecutor stated that "the force that was used [to commit the crime of carjacking] was the strangulation in the car. The moment the defendant decided to put an object around the victim's neck in order to get his car, that's the force."[6] The prosecutor also said the evidence showed that appellant intended to deprive Perillo of the car when appellant "drove, came back, tried to kill him, then drove away again, took the car again."

At the conclusion of her closing argument, the prosecutor stated that appellant "took the victim's wallet. He took Mr. Perillo, this elderly man, he took his car, he tried to kill him once and then went back to make sure that he'd done it. And when he got back there and realized the victim was not dead, he jumped on that guard rail and tried to strangle the life out of him, tried to kill him a second time. [¶] So he assaulted him the first time with a deadly weapon, with the object, he robbed him of his wallet, he carjacked him, took his car by force or fear, he committed elder abuse against him, . . . and he deliberately, premeditatively tried to kill Mr. Perillo."

Appellant argues that some of the prosecutor's comments during closing argument— such as when she said that appellant returned to strangle Perillo in the street "to finish the job" and "make sure that he's dead," and that appellant "tried to kill

[6] This comment is also relevant to the second issue raised on appeal regarding the applicability of section 654 to the assault with a deadly weapon count. (See pt. II.B.1., *post*.)

[Perillo] once and then went back to make sure that he'd done it"—show that she was not relying solely on the second strangulation incident to prove the attempted murder. As noted, however, immediately after this last quoted comment, the prosecutor concluded her argument with a concise summary of the charges and the prosecution's theory of the case, as had been set forth during the argument as a whole: "So he assaulted him the first time with a deadly weapon, with the object, he robbed him of his wallet, he carjacked him, took his car by force or fear, he committed elder abuse against him, . . . and he deliberately, premeditatively tried to kill Mr. Perillo." (See *Brown*, *supra*, 11 Cal.App.5th at p. 341.) The prosecutor thus consistently informed the jury that, regardless of appellant's intent at the moment of the first strangulation, she was relying on that incident to prove the assault with a deadly weapon charge and was relying solely on the second strangulation to prove the premeditated attempted murder charge. Accordingly, in context and in light of the prosecutor's overall argument, which repeatedly made clear that she was relying on the first incident to prove the assault with a deadly weapon count and the second incident to prove the premeditated attempted murder count, we do not believe the challenged comments undermine or render ambiguous the clear election made by the prosecutor during the course of her closing argument. (See *Brown*, at p 341; *Mayer*, *supra*, 108 Cal.App.4th at p. 418.)

Appellant next argues that under *People v. Melhado* (1998) 60 Cal.App.4th 1529 (*Melhado*), the prosecutor was required not only to make the election clear in her argument, but was also required to explicitly inform the jury that she was making that election. In *Melhado*, Division Three of this District found that, although it was possible "to parse the prosecution's closing argument in a manner which suggests that more emphasis was placed on [one of several alleged threats] than on the others. However, even assuming that this was so, that we find the argument did not satisfy the requirement that the jury either be instructed on unanimity or informed that the prosecution had elected to seek conviction *only* for the [selected] event, so that a finding of guilt could only be returned if each juror agreed that the crime was committed at that time. Because the prosecutor did not directly inform the jurors of his election, and of their concomitant

duties, it was error for the judge to refuse a unanimity instruction in the first instance and to disregard his sua sponte duty thereafter." (*Id.* at p. 1536.) The court concluded: "If the prosecution is to communicate an election to the jury, its statement must be made with as much clarity and directness as would a judge in giving instruction. The record must show that by virtue of the prosecutor's statement, the jurors were informed of their duty to render a unanimous decision as to a particular unlawful act." (*Id*. at p. 1539.)

First, *Melhado* is distinguishable from the present case in that there, the prosecutor referred to several acts during closing argument without ever telling the jury which act it should consider for purposes of finding the defendant guilty of the charged offense. (See *Melhado, supra,* 60 Cal.App.4th at p. 1536.) Second, subsequent cases have not read *Melhado* to require that the prosecutor directly instruct the jury on its election and the need for unanimity. Instead, the cases have held that a trial court need not instruct on the unanimity requirement when the prosecution's argument makes its election clear to the jury. (See, e.g., *People v. Mahoney* (2013) 220 Cal.App.4th 781, 796 [where prosecution made clear that it was relying on defendant's possession of child pornography on a particular date, "the prosecution made the essential election that removed from this case the need to give a unanimity instruction"]; *People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292 [because prosecution's opening and closing arguments demonstrated that it was electing a particular threat as the basis of criminal threats count, "[t]his election obviated the necessity of a unanimity instruction"]; *Mayer, supra,* 108 Cal.App.4th at p. 418 [prosecutor made required election when she made clear in opening and closing argument that she was relying on a certain act to support soliciting charge]; *People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1455 ["Because the prosecutor's opening argument elected what conduct by defendant amounted to the crime charged, we conclude that no unanimity instruction was required"].)

Because the prosecutor's closing argument in this case made clear that she had elected the second strangulation incident to support the premeditated attempted murder

charge, the court was not required to instruct the jury sua sponte on the need for unanimity as to that count. (See *Mayer*, *supra*, 108 Cal.App.4th at p. 418.)[7]

II. *Section 654*

Appellant contends the conviction for assault with a deadly weapon was "so closely related" to the conviction for carjacking or, alternatively, to the conviction for attempted murder that the court erred when it declined to stay his sentence on the assault with a deadly weapon count pursuant to section 654.

A. *Trial Court Background*

At appellant's sentencing hearing, the court found, as to count one, that the premeditated attempted murder conviction was based on the second strangulation, "after he returned after first leaving the scene when the victim fell out of the car and the defendant left the scene. Many minutes later he returned to the scene and tried to kill the victim. If it wasn't for the good Samaritan, that might have happened. . . . [¶] There was a substantial . . . time and opportunity to reflect on his actions. So the court finds there is no [section] 654 issue with the other counts." The court sentenced appellant on the premeditated attempted murder count to life in prison with the possibility of parole plus a

[7] We find unpersuasive appellant's assertion in his reply brief "that because of the lack of a unanimity instruction, . . . some jurors could have concluded that only *both* incidents taken together gave rise to the offense of attempted murder. Such an erroneous conclusion would explain how the jury found true the ligature use allegation despite the testimony that appellant strangled Perillo with his bare hands in the second incident." This is speculation. Although De Sousa said he saw appellant strangle Perillo with his hands, he also testified that it was dark out and he was some distance away from appellant and Perillo. The evidence also showed that a wire was found at the scene. During closing argument, the prosecutor stated that, "although we don't know which weapon it was or what was used, we know that the weapon was used at least . . . the first time [appellant] strangled [Perillo] in the car. Now, De Sousa said that . . . it looked like he was using his hands . . . when he tried to kill him the second time, when he went back. He said it looked like he used his hands. So perhaps he didn't use a deadly weapon at that moment." Thus, while there was testimony that appellant used his hands to strangle Perillo by the BART tracks, the jury was not foreclosed from finding that he had in fact used a weapon during this second strangulation.

five-year consecutive term for the section 12022.7, subdivision (c) enhancement and a one-year consecutive term for the section 12022, subdivision (b)(1) enhancement.

The court then sentenced appellant on count two, carjacking, to a consecutive nine-year upper term plus a consecutive five-year term for the section 12022.7, subdivision (c) enhancement; a consecutive one-year term for the section 12022, subdivision (b)(1) enhancement; and a consecutive one-year term for the section 667.9, subdivision (a) enhancement.

The court also imposed sentence on counts three (robbery) and four (elder abuse) and the related enhancements, but stayed the sentences pursuant to section 654.

Finally, as to count five, assault with a deadly weapon, the court sentenced appellant to a one-year term (one-third the midterm) on that count plus a five-year consecutive sentence for the section 12022.7, subdivision (c) enhancement. The court found that this count was "not subject to 654 restrictions because [appellant's] intent and objective was to use a ligature to choke the victim and unexpectedly the victim fell out of the car. Once the victim fell out of the car, the defendant's intent and objective was to take the car in the carjacking."

Appellant's aggregate term of imprisonment was 28 years to life in prison.

B. *Legal Analysis*

Section 654, subdivision (a) provides in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

" ' " ' Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' " ' [Citation.]" (*People v. Jackson* (2016) 1 Cal.5th 269, 354 (*Jackson*); accord, *People v. Corpening* (2016) 2 Cal.5th 307, 311-312 [section 654 applies either when both offenses were

completed by a single physical act or when a course of conduct reflects a single intent and objective].)

"The question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them. [Citations.]" (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312-1313 (*Hutchins*).) In conducting this substantial evidence review, we view the evidence "in a light most favorable to the judgment, and presume in support of the court's conclusion the existence of every fact the trier of fact could reasonably deduce from the evidence." (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 271 (*Cleveland*).)

1. *Assault With a Deadly Weapon and Carjacking Counts*

The question with respect to the assault with a deadly weapon and carjacking counts is whether substantial evidence supports the court's finding that, appellant's strangulation of Perillo with a ligature in the car and the subsequent taking of the car reflect "a single ' "intent and objective" ' or multiple intents and objectives." (*People v. Corpening*, *supra*, 2 Cal.5th at p. 312.) We conclude the court properly sentenced appellant separately on these two counts because the evidence supports the court's findings that these offenses were committed with multiple intents.

Appellant points out that one of the elements of carjacking is the use of "force or fear to take the vehicle or to prevent [the] person from resisting." (CALCRIM No. 1650; see also Pen. Code, § 215 [carjacking is "accomplished by means of force or fear].) However, as Division Four of this District explained in a case involving convictions for attempted murder and robbery, "an act of 'gratuitous violence against a helpless and unresisting victim . . . has traditionally been viewed as not "incidental" to robbery for purposes of Penal Code section 654.' [Citations.]" (*People v. Bui* (2011) 192 Cal.App.4th 1002, 1016.) In that case, the appellate court held that where "the evidence showed that the defendant continued to shoot [the victim] after he fell to the floor, face

down, unable to move," the defendant's intent and objectives were factual questions for the trial court. (*Ibid*.; see also *Cleveland*, *supra*, 87 Cal.App.4th at pp. 271-272.)

In *Cleveland*, a case that bears similarities to the present one, the appellate court found that "[s]ufficient evidence existed for the court to conclude Cleveland harbored divisible intents [and objectives] in committing two separate crimes—robbery and attempted murder of Freeman [the victim]. We do not agree with Cleveland that both crimes were committed pursuant to the intent to rob Freeman of his Walkman. As the trial court observed, the amount of force used in taking the Walkman was far more than necessary to achieve one objective. Cleveland repeatedly hit his 66-year-old feeble, unresisting victim on the head and body with a two-by-four board. Cleveland struck Freeman until the board broke and left him unconscious. While it is true that attempted murder can, under some circumstances, constitute the 'force' necessary to commit a robbery, here, it was not the necessary force. As the court in *People v. Nguyen* (1988) 204 Cal.App.3d 181, observed: 'at some point the means to achieve an objective may become so extreme they can no longer be termed "incidental" and must be considered to express a different and more sinister goal than mere successful commission of the original crime. . . . [¶] . . . [¶] . . . [S]ection [654] cannot, and should not, be stretched to cover gratuitous violence or other criminal acts far beyond those reasonably necessary to accomplish the original offense.' Cleveland beat Freeman senseless, such that the attempted murder cannot be viewed as merely incidental to the robbery.

"The finding Cleveland had separate and simultaneous intents is further bolstered by the evidence that Cleveland and Freeman had a history of negative interaction. Cleveland had been angered by Freeman's refusal to give him more money after Cleveland ran the errand to buy Freeman cigarettes. In addition, shortly before Cleveland attacked Freeman, Cleveland became upset when his attempt to steal Freeman's walker was foiled. It is this history which motivated the gratuitous violence supporting the finding of two simultaneous intents." (*Cleveland*, *supra*, 87 Cal.App.4th at pp. 271-272, fn. omitted.)

Likewise, in the present case, substantial evidence supports the court's separate sentences on the assault with a deadly weapon and carjacking counts. As the prosecutor stated during closing argument, "[t]he moment the defendant decided to put an object around the victim's neck in order to get his car, that's the force" needed for purposes of the carjacking offense Appellant's ensuing strangulation of Perillo with the ligature went far beyond the force needed to accomplish the carjacking. (See *Cleveland, supra,* 87 Cal.App.4th at pp. 271-272.) Appellant's own statements after his arrest support this conclusion. Appellant told Godlewski that "[i]t crossed [his] mind" to choke Perillo and take his car when Perillo "showed his face" at the bus stop. This was because of appellant's disgust that Perillo was "so old" and "gay." These comments, together with other evidence presented at trial, demonstrated that, like the defendant in *Cleveland,* appellant was already angry at Perillo before the attack and that he used force against his elderly and unresisting victim that was not incidental to the force needed to commit the carjacking. (See *Cleveland*, at pp. 271-272; *People v. Nguyen*, *supra,* 204 Cal.App.3d at p. 190; *People v. Bui, supra,* 192 Cal.App.4th at p. 1016.) Accordingly, there was substantial evidence from which the court could find that appellant had two "separate and simultaneous intents": to assault Perillo with a deadly weapon and to commit the carjacking. (*Cleveland*, at p. 272; see also *Jackson*, *supra*, 1 Cal.5th at p. 354 [defendant's own statement supported court's finding that despite temporal proximity of burglary-robbery and murder, crimes were not incident to a single objective].)

Second, the court found that appellant's initial objective was to use a ligature to choke Perillo, but when Perillo fell out of the car during the attack, appellant's objective became to take Perillo's car. This finding, which could reasonably be deduced from the evidence, further supports the conclusion that the assault with a deadly weapon was *not* incidental to the carjacking. (See *Jackson*, *supra*, 1 Cal.5th at p. 354; *Hutchins, supra*, 90 Cal.App.4th at pp. 1312-1313; *Cleveland, supra,* 87 Cal.App.4th at p. 271.)

In sum, viewing the evidence "in a light most favorable to the judgment" (*Cleveland, supra,* 87 Cal.App.4th at p. 271), substantial evidence supported the court's finding that appellant's intent and objective in strangling Perillo with a ligature was

divisible from the carjacking. Separate punishments were therefore appropriate. (See *Jackson*, *supra*, 1 Cal.5th at p. 354; *Hutchins*, *supra*, 90 Cal.App.4th at pp. 1312-1313.)[8]

2. *Assault With a Deadly Weapon and Attempted Murder Counts*

Appellant also argues, in the alternative, that if the assault with a deadly weapon conviction was based on the same conduct underlying the attempted murder conviction, a stay of the assault count is required by section 654. (See *People v. Meriweather* (1968) 263 Cal.App.2d 559, 563-564 [because assault with a deadly weapon and attempted murder "were committed in the same course of criminal conduct," multiple punishment was prohibited by § 654].) As already explained, the record reflects the prosecutor's election of the second strangulation incident near the BART tracks as the attempted murder count. (See pt. I., *ante*.) At sentencing, the court found that the attempted murder count did not present any section 654 problem with respect to the other counts: "Many minutes later he returned to the scene and tried to kill the victim. . . . [¶] There was a substantial . . . time and opportunity to reflect on his actions." The court's finding that section 654 does not prohibit separate sentences for the attempted murder and assault with a deadly weapon counts is supported by substantial evidence. As the court noted, the assault with a deadly weapon offense took place at a different time and place from the attempted murder, giving appellant significant time to reflect on his actions before he

[8] We find unpersuasive appellant's reliance on *People v. Nunez* (2012) 210 Cal.App.4th 625. In that case, like the present one, the defendant was convicted of assault with a deadly weapon and carjacking. (*Id*. at p. 629.) The appellate court found that because the evidence showed that the "hammer use and taking of the car were contemporaneous if not simultaneous," the assault was incidental to the carjacking and defendant could not be separately punished for both offenses. (*Id*. at p. 630.) In *Nunez*, however, the evidence showed that the defendant, who was found legally insane at trial, heard voices telling him to " 'take the car' " and " 'get in the car.' " (*Id*. at p. 628.) The court found it apparent from the evidence that the defendant wielded the hammer to take the car and the victim was not going to peacefully surrender the car. (*Id*. at p. 630.) The court further concluded that use of the hammer was not a gratuitous act of violence, nor was it motivated by animus unrelated to the taking of the car. (*Ibid*.) The underlying facts in this case are quite distinct from those in *Nunez*, and, as discussed, support the trial court's separate punishments.

subsequently located Perillo and attempted to kill him. (See *People v. Lopez* (2011) 198 Cal.App.4th 698, 717 [" 'multiple crimes are not one transaction where the defendant had a chance to reflect between offenses and each offense created a new risk of harm' "]; see also *Hutchins*, *supra*, 90 Cal.App.4th at pp. 1312-1313.)

III. *Section 1001.36*

While appellant's appeal was pending and after briefing was complete, the Legislature enacted section 1001.36, which created a pretrial diversion program for certain defendants with mental disorders. The effective date of the statute was June 27, 2018. Shortly after oral argument in this case, Division Three of the Fourth District Court of Appeal held in *People v. Frahs* (2018) 27 Cal.App.5th 784 (*Frahs*), review granted December 27, 2018, S252220, that section 1001.36 is retroactive to all cases not yet final on appeal. On December 27, after the parties filed their supplemental briefs on this issue, our Supreme Court ordered review of *Frahs* on its own motion.

In supplemental briefing filed before the Supreme Court granted review in *Frahs*, appellant asked us to follow *Frahs* and find section 1001.36 retroactive and therefore applicable to him, given that, like the defendant in *Frahs*, "his case is not yet final on appeal and the record affirmatively discloses that he appears to meet at least one of the threshold requirements (a diagnosed mental disorder)."[9] (*Frahs*, *supra*, 27 Cal.App.5th at p. 791.) Respondent, on the other hand, asserts that *Frahs* was incorrectly decided and that section 1001.36 is not retroactive, citing to the language of that section defining "pretrial diversion" as "the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged *until adjudication* . . . ." (§ 1001.36, subd. (c), italics added.)

[9] Appellant entered a plea of not guilty by reason of insanity and a defense expert testified at trial that appellant had a "suggested" diagnosis of post-traumatic stress disorder, delusionary disorder, major depressive disorder, depressive personality disorder, and paranoid personality disorder. Post-traumatic stress disorder is on section 1001.36, subdivision (b)(1)'s non-exhaustive list of qualifying mental disorders.

We need not decide whether we agree with the *Frahs* court's analysis of the retroactivity issue because, considering the particular—and extreme—circumstances of this case, it is inconceivable that the trial court would find appellant eligible for pretrial diversion under section 1001.36. Among the many criteria that must be met before a trial court may grant pretrial diversion, the statute requires that the court be "satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18,[10] if treated in the community. The court may consider the opinions of the district attorney, the defense, or a qualified mental health expert, and may consider the defendant's violence and criminal history, the current charged offense, and any other factors that the court deems appropriate." (Former § 1001.36, subd. (b)(6).)[11]

Appellant was charged in this case with premeditated attempted murder, carjacking, elder abuse, and assault with a deadly weapon. In addition, the information alleged that appellant had committed great bodily injury against an elderly victim; had used a deadly weapon, a ligature, in committing the offenses; and had committed a violent crime and inflicted great bodily injury against a vulnerable person.[12] Given the nature of the charges, even assuming we were to find that section 1001.36 is retroactive to all cases not final on appeal, we conclude appellant would plainly be ineligible for relief. (See § 1001.36, subd. (b)(1)(F); former § 1001.36, subd. (b)(6).) We therefore

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[10] Section 1170.18, subdivision (c) provides: "As used throughout this code, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667." This list of serious or violent felony convictions referred to in section 667 includes, inter alia, "[a]ny homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5." (§ 667, subd. (e)(2)(C)(iv)(IV).)

[11] Section 1001.36 has recently been amended, effective January 1, 2019, and the language of former subdivision (b)(6) is now found in subdivision (b)(1)(F).

[12] The information also included three prior conviction allegations, for second degree commercial burglary (§ 459), battery with injury on a peace officer (§ 243, subd. (c)(2)), and possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)).

decline his request to conditionally reverse the judgment and remand the matter to the trial court for a diversion eligibility hearing.

DISPOSITION

The judgment is affirmed.

_____
Kline, P.J.

We concur:

_____
Stewart, J.

_____
Miller, J.

People v. Kimia (A147709)